1988

Sweeney Land Company v. Gilbert Kimball and Maud Kimball v. Melvin fletcher and Peggy Fletcher, et al. : Brief of Appellant

Utah Supreme Court

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Robert Felton; Attorney for Appellees.

Recommended Citation

Brief of Appellant, *Sweeney Land Company v. Kimball*, No. 880485.00 (Utah Supreme Court, 1988).
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IN THE SUPREME COURT OF THE STATE OF UTAH

SWEENEY LAND COMPANY,

Plaintiff and Appellee,

v.

GILBERT KIMBALL and MAUD KIMBALL,

Defendants and Appellee,

GILBERT KIMBALL and MAUD KIMBALL, et al.,

Crossclaim Plaintiffs and Appellee,

v.

MELVIN FLETCHER and PEGGY FLETCHER, et al.,

Petitioners and Appellants.

Case No. 880485
Priority No. 13

BRIEF OF APPELLANTS MELVIN FLETCHER AND PEGGY FLETCHER

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II

STATEMENT OF JURISDICTION AND NATURE OF THE CASE

Jurisdiction is conferred by Title 78, Chapter 2, Section 2, Subsection (5) U.C.A. authorizing review by the Supreme Court of Utah of the decisions of the Court of Appeals by Writ of Certiorari and under Subsection (3)(j) of Section 2. This case was transferred from the Supreme Court to the Court of Appeals pursuant to 78-2a-3(2)(j) U.C.A. after appeal from the District Court for Summit County, Utah.

This is an appeal from a decision of the Utah Court of Appeals in a civil quiet title action originally filed and tried to the Court sitting without a jury in the District Court for Summit County.

III

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals misapply the standard for appellate review of the facts in a civil case when it construed conflicting facts opposite the findings of fact by the trial judge.

2. May the common law doctrine of laches bar a co-tenant from asserting rights to real property in litigation against another co-tenant.

3. May the common law doctrine of equitable estoppel be used to prevent a defense against adverse possession by a co-tenant.

4. May a prescriptive easement be defeated by evidence of permission to use from a non-owner of the contested land.

IV

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES, RULES AND REGULATIONS

There do not appear to be any constitutional provisions, statutes, ordinances, rules or regulations of administrative bodies whose interpretation is determinative, however, the Court must interpret the provisions of 78-12-7, of the Utah Code which is set forth below:

> "78-12-7 Adverse possession - possession presumed in owner
>
> In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of this action."

V

STATEMENT OF THE CASE

This is a quiet title case filed by Sweeney Land Company pursuant to the provisions of 78-40-1, Utah Code Annotated against Gilbert and Maud Kimball and Melvin and Peggy Fletcher. The Kimball's Counterclaimed against Sweeney and Crossclaimed against the Fletchers and the Fletchers' Crossclaimed and Counterclaimed against Sweeney Land Company and the Kimballs. The land at issue is principally the rear yard of the Fletcher's home.

Gilbert and Maud Kimball claimed title based on a 1940 deed from Summit County to Robert Kimball and Gilbert Kimball as co-tenants and served summons by publication on all unnamed parties, including Robert Kimball's successors. The Fletchers notified the surviving heir of Robert Kimball of the action and during the pendancy of the proceedings acquired the interest of Robert Kimball which had passed to his heir, Elizabeth Kimball.

Trial was held on September 5 and 6th, 1985 to the Court. Findings of Fact, Conclusions of Law and a Decree of Quiet Title were entered. The Decree quieted title in Sweeney Land Company as to a portion of the land, Maud Kimball as the successor to Gilbert Kimball to a portion of the land and Melvin Fletcher and Peggy Fletcher to the land upon which their yard, outbuildings and driveway are located. (Appendix Exhibit 2 - Summary Chart of Claims and Decree)

Maud Kimball and Sweeney Land Company appealed to the Utah Supreme Court and the case was transferred to the Utah Court of Appeals. The Utah Court of Appeals, in an opinion filed October 3, 1988, held: That laches barred Melvin and Peggy Fletcher from asserting the co-tenant interest originating with Robert Kimball and defending against the adverse possession claim of co-tenant Maud Kimball, that estoppel barred Melvin Fletcher and Peggy Fletcher from asserting the co-tenant interest originating with Robert Kimball and defending against the adverse possession claims of co-tenant Maud Kimball, and that the prescriptive easement claims of the Fletchers failed because Melvin Fletcher's father had permission to use a parcel of land·which was separate and unrelated for access to his adjoining property.

STATEMENT OF FACTS

In March of 1940 Robert W. Kimball and Gilbert J. Kimball purchased the disputed parcel of land located in Park City from Summit County. Robert moved to Salt Lake City in 1940 (trans. p. 205, L.8) and Gilbert continued to live in Park City. Gilbert paid all the property taxes from 1940 to 1983 amounting to $4,641.65 (Trans. p. 147, L.10). Robert did not convey his interest during his lifetime and remained the record owner of a 50% interest; when he died in 1975 his co-tenant interest passed to his heir, Elizabeth Kimball. (Trans. p. 163-164.)

In 1976 and 1977 Gilbert conveyed his 50% co-tenant interest in the parcel by recording two quit claim deeds from himself to he and Maud as joint tenants; an original, Appendix Exhibit 5, and a correction deed, Appendix Exhibit 6. In each deed he acknowledged the purchase by Gilbert and Robert in 1940. After 1971 the county recorder's records indicated that Robert W. Kimball owned a 50% interest and that Gilbert and Maud as joint tenants owned a 50% interest. (See Plaintiff's Trial Exhibit 4, Abstract of Title)

Gilbert took no action to place Robert on notice that he claimed adversely to Robert at any time. (Appendix Exhibit 7 -

Deposition of G. Kimball, p. 51-52) Gilbert did not rely on any action or lack of action by Robert at any time. (Appendix Exhibit 7 - Deposition of G. Kimball p. 51-52) Gilbert and Maud believed their payment of taxes entitled them to take Robert's interest. (Appendix Exhibit 7 - Deposition of Gilbert Kimball, p. 52.) After the purchase of Robert's co-tenant interest from his heir, Elizabeth, the Fletchers asked the court to quiet title in them and to Maud Kimball as co-tenants. Gilbert and Maud claimed to have adversely possessed against Robert and claimed sole ownership. The Fletchers also asked that the co-tenant interests be partitioned as the interests of the parties may appear in the most logical fashion and tendered payment of the property taxes by payment in to court.

The Court of Appeals reversed the trial court and held that Gilbert's redemption of the property from a preliminary tax sale in 1947 was notice to Robert of an adverse claim and gave rise to a cause of action by Robert. The Appellate Court held that Robert's failure to claim his interest from his co-tenant prior to his death constituted unreasonable delay conduct prejudicial to Gilbert and Maud Kimball. (Appendix Exhibit 1 - Opinion of the Utah Court of Appeals)

VI

SUMMARY OF ARGUMENTS

POINT I

The Court of Appeals misapplied the standard of review for the findings of fact by a trial judge. The Court of Appeals totally disregarded the standard which is to review the facts in the light most favorable to sustaining the findings of the trial court. The reviewing court should resolve the interpretation of conflicting facts to be consistent with the findings of the trial court.

The Court of Appeals construed conflicting facts completely opposite the findings of fact by the trial court and found facts it believed support principles of laches and estoppel. The court used its conflicting interpretation of the facts to reverse the trial judge, disregarding the version of the facts favorable to the Appellants.

POINT II

Laches may not be asserted to prevent a defense against a claim of adverse possession by a co-tenant. The Appellants claimed a co-tenant interest in the disputed parcel. Gilbert and Maud presented various theories in opposition to the Appellants' ownership:

1. That the Appellants were barred from asserting ownership by 78-12-7 and 78-12-12 U.C.A. (Adverse possession)
2. That a delay in the litigation of Robert's interest prevented the Appellants from asserting the co-tenant interest.
3. That the Appellants were estopped by Robert's failure to pay taxes from claiming an interest.

The Appellants defended by proving that no notice of adverse possession or intent to exclude Robert was present, that no event occurred giving Robert a legal right adverse to Gilbert and Maud where Robert or his successor in interest unreasonably delayed and that Robert's failure to pay taxes gave rise to a claim for monetary contribution in favor of Gilbert and Maud.

The Court of Appeals erred in finding that laches prevented the Appellants from <u>defending</u> against the Kimballs' claims.

POINT III

Under the facts here, estoppel may not bar a co-tenant from defending against a claim of adverse possession.

The Court of Appeals held that Robert's conduct consisting of silence, inaction, and a disputed statement refusing to pay taxes were repudiated by the Appellants' assertion of the co-tenant real property interest.

The Court erred in failing to apply the law defining the rights of co-tenants in real property matters. A property owner can hold title in silence and is not required to take any action to hold title in real property. When title is vested it can only be divested in certain ways. Robert did not deed the property, he was not placed on notice of any matter which would give rise to a cause of action, and the assertion of title by one holding title cannot be barred by estoppel based on silence and inaction.

POINT IV

The Court of Appeals disregarded the evidence of prescriptive easement and mistakenly applied the doctrine of adverse possession. The Court below clearly misapplied the law with respect to prescriptive easements and the establishment of a prescriptive easement by the Appellants. The opinion below discusses the establishment of prescriptive easements in terms applying the law of adverse possession. On page 5 of the opinion the title of the section of the opinion is "Adverse Possession" while clearly the Fletchers claim under the findings of the trial court was a claim for a prescriptive easement. The Appellate Court used entirely the wrong standard and evaluated the wrong issues with respect to the findings of the trial court establishing a prescriptive easement. The appellants were never awarded any property rights by adverse possession and the opinion of the Court of Appeals should be reversed and the findings of the trial court reinstated with respect to the establishment of the Fletchers' prescriptive easement.

ARGUMENT

POINT I

THE UTAH COURT OF APPEALS MAY NOT SUBSTITUTE ITS VIEW OF THE FACTS AND THE CREDIBILITY OF THE WITNESSES FOR THE JUDGMENT OF THE TRIAL COURT

The Utah Court of Appeals literally ignored the Findings of Fact by the trial court and wrote the facts of this case. The standard the Appellate Court should use in reviewing decisions of a trial court in a quiet title case is stated in Ash v. State [1]

> "The appellant is required to sustain the burden of proving error, and the judgment of the trial court will not be disturbed if there be substantial evidence in the record to support it"

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[1] Ash v. State, 572 P.2d 1374, (Utah 1977).

and is variously stated in a series of decisions by this Court. For example, in Scharf v. BMG Corporation: [2]

> "To mount a successful attack on the trial court's findings of fact, an appellant must marshall all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings."

In Cutler v. Bowman: [3]

> "In analyzing these opposing contentions we follow the traditional rule of viewing the evidence and all inferences that can reasonably be drawn therefrom in the light favorable to the findings made and the conclusions drawn by the trial court."

and in Oberhansly v. Earle: [4]

> "We begin by noting that on appeal the decision of the trial court is entitled to a presumption of validity. We are required to view the evidence and any inferences drawn therefrom in the light most favorable to sustaining the decision."

It is clear that the Court places the burden on the appellant from the trial court, the appellees here, to demonstrate that reasonable minds could not agree with the findings by the lower court as in Lawrence v. Bamberger Railroad Co., [5]

> "When the court has made findings and entered judgment thereon as was done here, it is then our duty to review the evidence in the light most favorable to the findings, and they must be allowed to stand if reasonable minds could agree with them."

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[2] Scharf v. BMG Corp, 700 P. 2d 1068, (Utah 1985).
[3] Cutler v. Bowman, 543 P.2d 1349, (Utah 1975).
[4] Oberhansly v. Earle, 572 P.2d 1384, (Utah 1977).
[5] Lawrence v. Bamberger Railroad Co., 3 Utah 2d 247, 282, P.2d 335, (1955).

and in R. C. Tolman Construction Co., Inc. v. Myton Water Association.[6]

> "In analyzing the Plaintiff's contentions, it is appropriate to have in mind these basic rules of review on appeal: that we indulge the findings and judgment of the trial court with a presumption of validity and correctness; review the record in the light favorable to them; do not disturb them if they find substantial support in the evidence; and require plaintiff to sustain the burden of showing error."

The Court of Appeals apparently relied upon Acton v. Deliran,[7] a case where no findings of fact were prepared. Where the facts are contradictory, confusing and inconsistent, the Court is justified in not making findings with respect to those facts. See R. C. Tolman Construction Co. Inc. v. Myton Water Association where the Court refused to find the facts as proposed by the Plaintiff.

The evidence before the trial judge on the issues of laches and estoppel quoted by the Court of Appeals, was limited to the testimony of Maud Kimball and Gary Kimball. Under the standard of review cited above, we should consider this evidence "in the light most favorable to the trial judge".

Maud testified to personally hearing statements by Robert Kimball in 1940 and in 1947. In the 1940 statement Robert

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[6] R. C. Tolman Construction Co. Inc. v. Myton Water Association, 563 P.2d 780, (Utah 1977).

[7] Acton v. Deliran, 737 P.2d 996, (Utah 1987)

allegedly said and Maud allegedly personally heard in response to a request for tax reimbursement:

> "I want to get out of Park City. I want to move away and I want nothing further to do with this".(trans. p. 126)

Maud's testimony at trial on the 1940 statement contradicts her deposition testimony. In her deposition she testified that the first statement she heard about was in 1947. (Appendix Exhibit 10 - Deposition of Maud Kimball, p. 21) Later Maud changed her initial testimony reported at page 126 of the transcript and testified that the reported 1940 statement actually occurred in 1947. (Trans. p. 128)

The conflict created by Maud's testimony of the 1947 statement is that Robert Kimball was not in Park City that year according to Elizabeth Kimball. (Trans. p. 208)

All of Maud's testimony is contradicted by Gilbert at his deposition and by her own spontaneous statement during Gilbert's deposition. (Appendix Exhibit 7 - Deposition of Gilbert Kimball, p. 52). Gilbert testified that he let the property go to tax sale and purchased it from the county in his name on the advise of a local judge. There is no evidence of such a tax sale on record. (See Plaintiff's Exhibit 4.)

Gary described in a somewhat vague statement that he heard Bob agree with Gilbert's management of the property in 1953. Gary does not tell us what Gilbert did or what Gilbert told Robert. (Trans. p. 156, L. 10-14) Again, Elizabeth Kimball is very sure her husband wasn't in Park City during 1953.

The evidence of statements to or from Robert were heavily contradicted by the evidence that he was <u>not in the State</u> or that such statements were not necessary. The trial court found the evidence to be unreliable that Robert made any of the statements supporting laches or estoppel after personally hearing Maud Kimball, Gary Kimball and Elizabeth Kimball testify. The findings of the trial court are reasonable under the circumstances, based on substantial evidence in the record and are entitled to the respect due a judge who has personally seen the witnesses, the candor or lack of candor and weighed the credibility of the witnesses.

The trial court here clearly and in detailed Findings of Fact set forth the basis for its finding that no evidence was present of any intent by Gilbert and Maud Kimball to exclude Robert or of any adverse notice to Robert; that Gilbert and Maud had not adversely possessed the property against their co-tenant Robert W. Kimball and his successors in interest. The Findings of Fact of the trial court and the Conclusions of Law are entitled to the presumptions of validity defined in the cases cited herein. It is of some interest that the opinion by the Court of Appeals does not challenge the Conclusions of Law or claim that the court misapplied the law to the facts as it found them. The Court of Appeals simply disagreed with the facts as found and chose to believe parties it had no opportunity to hear testify or see before it. The Court of Appeals did not apply the proper standard of review and its decision should be corrected and reversed and the trial judge's findings sustained.

POINT II

UNDER THE FACTS HERE, ESTOPPEL MAY NOT BAR A CO-TENANT FROM DEFENDING AGAINST A CLAIM OF ADVERSE POSSESSION

After deciding that laches prevented the petitioners from asserting the co-tenant interest of Robert Kimball, the Court of Appeals concluded that the Fletchers were also estopped from asserting Robert Kimball's co-tenant interest against the claim of adverse possession. The evidence upon which the estoppel finding is based were the same disputed statements recited in Point I above and were contradictory, conflicting and found unreliable by the trial court.

The statements attributed to Robert in the Court of Appeals opinion are similar to the statements attributed to the co-tenant which were found ineffective in Beckstrom v. Beckstrom,[8] where the party claiming adverse possession also claimed that his co-tenant was estopped from claiming his interest by statements that "he wanted nothing further to do with the property and that he refused to pay taxes on it" (578 P.2d 520 at page 522). Gilbert Kimball claimed that he gave Robert Kimball an opportunity to pay property taxes in 1947 and that Robert refused. (Deposition of Gilbert Kimball, page 52, Appendix Exhibit 6) Every statement attributed to Robert was contradicted by testimony from Robert's widow Elizabeth that he was not in Park City or the State of Utah during the years the claimed statements were made.

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[8] Beckstrom v. Beckstrom, 578 P.2d 520, (Utah 1978)

The allegations upon which the estoppel claim was based were immaterial, contradicted and were found to not be fact by the trial court.

The Court of Appeals use of estoppel between co-tenants here is contrary to the rule that in order for estoppel to exist there must be detrimental reliance by one party upon the acts or statements of the other. There is no detrimental reliance by Gilbert or Maud Kimball because they did nothing more than pay taxes on the property which they had an obligation to do in the absence of Robert's controverted statements. The claim of estoppel is also contradicted by the recitation in the 1976 and 1977 deeds from Gilbert Kimball to Gilbert Kimball and Maud Kimball (Appendix Exhibits 5 and 6) that Gilbert was conveying the interest he received with Robert Kimball in the 1940 deed from Summit County. Reliance by Gilbert and Maud Kimball on the silence and inaction of Robert Kimball certainly could not give rise to a claim of estoppel because Robert was not required to come forward or take any action to protect his interest in the absence of notice that Gilbert and Maud intended to adversely possess against him. In Olwell v. Clark [9] this Court held that mere length of time and exclusive possession alone is insufficient to find conduct creating a cause of action against a

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[9] Olwell v. Clark, 658 P.2d 585, (Utah 1982)

co-tenant and adverse possession. The Court held that in Utah the action of paying taxes and preserving title is presumed to be for the benefit of all co-tenants and does not exclude other co-tenants or give them a right of action. The same is true respecting possession and use of the property by one party or the reputation one party may enjoy as sole owner of the property.

Established Utah law requires a relationship of confidence and trust between co-tenants which is inconsistent and not compatible with the claims of estoppel and laches found by the Utah Court of Appeals. Because the Utah Court of Appeals failed to recognize the fiduciary standard between co-tenants and acknowledge this relationship in its discussion of the issues, the Court of Appeals has applied the law in a manner that is in conflict with many decisions of this Court.

POINT III

LACHES MAY NOT BE ASSERTED TO PREVENT A DEFENSE AGAINST A CLAIM OF ADVERSE POSSESSION BY A CO-TENANT

The Utah Court of Appeals found that the petitioners were barred by laches from asserting the co-tenant interest originating with Robert W. Kimball against a claim of adverse possession.

The law in Utah is fairly well settled on the legal principles governing relations between co-tenants. In Olwell v. Clark (Supra p. 15) the facts were similar to the facts here;

one co-tenant paid all the taxes on the property and the original grantee of the co-tenant interest died without mentioning the property in his estate. This Court in Olwell summarized a long line of Utah cases and held that co-tenants exist in a relationship of confidence and trust, that the payment of taxes by one inures to the benefit of both and that a co-tenant has no notice or reason to believe that the payment of taxes by another co-tenant is adverse in any way. The Utah Court of Appeals decision below is in direct conflict with the principles described in Olwell v. Clark and in many other consistent Utah cases.

Beginning with the early case of McCready v. Frederickson [10] the Utah Supreme Court adopted the rule that no co-tenant can acquire a greater interest against another co-tenant by the payment of taxes or purchase at a tax sale; a cause of action for reimbursement arises according to their respective shares. McCready held that because of the fiduciary relationship between co-tenants, the payment of taxes is not an incident causing grounds for action by one co-tenant against another. In order for laches to apply a party must know of some incident which gives rise to a cause of action. In the case of the payment of taxes by one co-tenant, a co-tenant who has not paid taxes has no

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[10] McCready v. Frederickson, 41 Utah 388, 126 P. 316, (1912)

cause of action against his co-tenant but has a duty of reimbursement. Gilbert and Maud could have demanded reimbursement and sued for repayment of Robert's share of the taxes but never pursued any notice or claim against Robert. The Kimballs did not improve the property and did not exclude Robert.

See: Matthews v. Baker [11] affirming the principle that tenants-in-common stand in a fiduciary relationship to one another.

In Sperry V. Tolley [12] this Court again held that co-tenants stand in a fiduciary relationship to one another, that the payment by one co-tenant of all taxes and the purchase by a co-tenant for taxes did not constitute acts allowing the tax-paying co-tenant to acquire sole title to the property by adverse possession. The Court retained the rule adopted earlier that the purchase of a tax title is insufficient to put co-tenants on notice. The Court of Appeals decision below is in conflict with Sperry v. Tolley where the Court finds that redemption from a tax sale is notice for purposes of laches.

In Heiselt v. Heiselt [13] this Court held that co-tenants stand in a fiduciary relationship and hold title in trust for each other. This Court held that in the absence of the adversing co-tenant informing the other co-tenant of its claim of exclusive

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[11] Matthews v. Baker, 47 Utah 532, 155 P. 427, (1916)

[12] Sperry v. Tolley, 114 Utah 303, 199 P.2nd 542, (1948)

[13] Heiselt v. Heiselt, 10 Utah 2d 126, 349 P.2d 175, (1960)

ownership, adverse possession could not be used to bar a co-tenant from asserting title. This Court used the familiar language that a tenant in common must "bring it home" to his co-tenant and show by the most open and notorious acts that his possession is intended to exclude in every way the rights of the co-tenant.

It is appropriate to reiterate that "acquiring title by adverse possession" means to rely on the statute of limitations (78-12-7 U.C.A.) to bar another from proving title to real property. The adverse possession statute of limitations can only begin to run against a co-tenant where notice "brings it home" to a co-tenant that an ouster is underway. In this case, the 1976 and 1977 quit claim deeds (Appendix Exhibits 5 and 6) between Gilbert Kimball and Maud Kimball indicated that the claim of Gilbert Kimball is founded upon his co-tenant interest with Robert W. Kimball. The deed language constitutes an admission that Robert W. Kimball or his successors in interest hold a co-tenant interest in the property as of the dates of the deeds.

The decision of the Utah Court of Appeals finding that laches may be used between fiduciaries where one party has not been placed on notice of a reason for taking action is in conflict with the law and decisions of this Court in McCready v. - Fredrickson, Sperry v. Tolley, Heiselt v. Heiselt, and Olwell v. Clark and others. The fact that one co-tenant pays taxes does not give rise to a cause of action by the non-paying co-tenant. The approval of the Court of Appeals of such a procedure is in conflict with the prior decisions of this Court with respect to the relationship of co-tenants between one another in the question of payment of property taxes and effectively reverses all prior decisions for the appellants.

POINT IV

PERMISSION FROM A NON-OWNER OF REAL ESTATE WILL NOT DEFEAT THE OPEN NOTORIOUS AND ADVERSE CHARACTER OF USE REQUIRED TO ACQUIRE PRESCRIPTIVE RIGHTS

The trial court found that a portion of the subject property lying between the warehouse parcel and the Coalition Building parcel had been used and occupied by the appellants or Mel Fletcher for a period in excess of twenty (20) years openly, notoriously and adversely to all parties. (Appendix Exhibit 3 Finding No. 10) The finding is the result of a claim by the appellants that as an alternative to the co-tenant interest of Robert Kimball, the appellants hold prescriptive rights. Melvin and Peggy Fletcher's home is located on a parcel of land immediately adjacent to and north of the Roy Fletcher home. To the rear of both parcels is the warehouse parcel purchased by Gilbert and Robert Kimball in 1940.

A driveway exists across the south end of the warehouse parcel to the rear of the Roy Fletcher parcel.

A separate driveway on the opposite end of the adjoining parcels exists to the rear of the home owned by Melvin and Peggy Fletcher. The two Fletcher parcels (Mel and Roy) are separate and distinct adjoining lots. During the course of the litigation Gilbert Kimball obtained written statements from Melvin Fletcher's brother and sister (Appendix Exhibits 8 and 9) stating that Roy Fletcher had permission to use the driveway and the adjacent land on the South end to the rear of the Roy Fletcher parcel. No testimony from third parties provided any evidence of permission to use the north end of the warehouse parcel.

There was no evidence that prior to 1976 Gilbert Kimball or Maud Kimball claimed the land described in Finding No. 10 by the Court. Only in 1976 and in the later 1977 correction deed did Gilbert and Maud Kimball put anyone on notice by the recordation of those deeds that they claimed any interest in the land over which Mel Fletcher claims prescriptive rights. Mr. Fletcher's use of the area for more than 20 years prior to 1976 defined in Finding No. 10 was clearly open, notorious and hostile to all parties hereby creating a prescriptive easement. See: Zollinger v. Frank [14], Jensen v. Brown [15], Crane v. Crane [16]. He neither sought nor obtained permission from Gilbert Kimball to use the parcel because Gilbert Kimball never claimed the parcel prior to 1976. Melvin Fletcher purchased the land in 1954 and

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[14] Zollinger v. Frank, 110 Utah 514 175 P.2d 714, (1946).
[15] Jensen v. Brown, 639 P.2d 150, (Utah 1981).
[16] Crane v. Crane, 683 P.2d 1062, (Utah 1984).

used the driveway and rear yard portions of the property for necessary outbuildings, garage and access to the street supporting the finding that he acquired a prescriptive easement. See: Malouf v. Fischer [17]. Prior to 1976, Gilbert Kimball did not claim the area and a party who is not an owner of real property cannot give permission to use property to defeat the claim of a prescriptive user who has used the property openly, notoriously and adversely to all parties. Here, Gilbert Kimball attempted to defeat the prescriptive claim of the Fletchers defined in the pleadings prior to the purchase of Elizabeth Kimball's co-tenant interest.

The appellants clearly demonstrated grounds for a prescriptive easement as an alternative to continue the use and occupancy of the land described in Finding No. 10 by the trial court. The Utah Court of Appeals opinion contradicting the trial court is in error finding that Gilbert Kimball's permission to Roy Fletcher somehow constituted permissive use by Melvin Fletcher of an entirely separate and distinct parcel of property. A separate and distinct parcel was not claimed by Gilbert and Maud Kimball until 1976 and therefore they could not have granted permission to use the area to Melvin Fletcher or his predecessor. The Court should find that Melvin and Peggy Fletcher have established a

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17. Malouf v. Fischer, 159 P.2d 881, (Utah).

prescriptive right as defined by the trial court and that the Fletchers are entitled to use their use and occupancy of the land described in Finding No. 10 of the Findings of Fact and Conclusions of Law and Decree of Quiet Title on file below.

CONCLUSION

The Utah Court of Appeals deviated substantially from established Utah Law in its opinion reversing the decision of the trial court. The court below erred in misapplying the principles established for the definition of co-tenant relationships in the State of Utah, the standard of review in quiet title matters and the establishment of a prescriptive easement. For all the foregoing reasons, the court should reverse the decision of the Utah Court of Appeals and reinstate the findings of the trial court or, in the alternative, require the trial court to make specific findings with respect to the laches and estoppel defenses proposed by the Utah Court of Appeals.

Respectfully submitted,

GERALD H. KINGHORN

CERTIFICATE OF SERVICE

I certify that on the ______ day of July, 1989, I served copies of the Appellants Brief on counsel for Gilbert and Maud Kimball, Robert M. Felton and counsel for Sweeney Land Company, Paul D. Veasy. I further certify that on the ____ day of July, 1989, I notified counsel for the opposing parties of the date of filing and the docket number of the case as provided by the clerk of the court.

DATED this ___________ day of July, 1989.

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ADDENDUM

INDEX OF APPENDIX EXHIBITS

RECEIVED
OCT - 5 1988

IN THE UTAH COURT OF APPEALS

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Sweeney Land Company,
    Plaintiff and Appellant,
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Gilbert and Maud Kimball,
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    Counterclaim-crossclaimants and Respondents.

OPINION
(Not For Publication)

Case No. 880080-CA

FILED
OCT [illegible] 1988
Mary Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Before Judges Davidson, Billings and Orme.

DAVIDSON, Judge:

This case involves conflicting claims to several small parcels of real property located in Park City, Utah. In 1980, the Sweeney Land Company (Sweeney) filed a complaint against Gilbert[1] and Maud Kimball (Kimballs) in addition to Melvin and Peggy Fletcher (Fletchers) seeking to quiet title to described land in Sweeney. The Fletchers counterclaimed and alleged they had possessed the property "openly, notoriously, and adversely for more than seven years and [they] have paid the taxes on the same for more than seven years." The Fletchers also claimed their use of the land gave them a "prescriptive right or incorporeal hereditaments to said lands."

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[1] Gilbert Kimball died during the course of litigation. The Kimballs were joint tenants in their property interests.

EXHIBIT 1

The Kimballs counterclaimed against Sweeney and crossclaimed against the Fletchers alleging they were the owners of the property as evidenced by a deed and, alternatively, by their adverse possession.

The Fletchers subsequently discovered Gilbert Kimball's deceased brother, Robert W. Kimball, allegedly held a cotenant interest in the property. Melvin Fletcher obtained a quit-claim deed from Robert's widow, Elizabeth, and then moved to amend the pleadings to claim a cotenant interest with the Kimballs and to request the property be partitioned. On February 22, 1984, the Fletchers tendered to the clerk of the court one-half the taxes on the property from 1942 to 1983 in view of their cotenant's interest. On August 1, 1984, Sweeney and the Fletchers filed a stipulation in which the two parties agreed to exchange quit-claim deeds concerning their respective interests in the parcels.

Trial to the court was held on September 5 and 6, 1985. A later hearing was held concerning objections to the proposed findings of fact, conclusions of law, and the judgment and decree of quiet title. Subsequently, the Kimballs and Sweeney moved for further amendments or for a new trial but were denied. We address only those issues which are dispositive.

Utah R. Civ. P. 52(a) requires that, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." We are bound to follow the rule together with the Utah Supreme Court's guidance, concerning the validity of findings of fact, in Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987). This court will "accord conclusions of law no particular deference, but review them for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

Fundamental to this opinion is our acceptance of the 1976 survey as the description of the property conveyed in the 1940 tax sale by Summit County to the brothers, Gilbert and Robert Kimball. The survey was executed by a licensed land surveyor who utilized the most accurate information then obtainable, whereas the 1940 tax deed is described in general terms.

ROBERT W. KIMBALL INTEREST

The Fletchers' claim is primarily based on the quit-claim deed obtained from Robert W. Kimball's widow, Elizabeth. For the quit-claim deed to have any validity, Robert must have been a cotenant with Gilbert until his death and Elizabeth must have been Robert's successor in interest. There is no doubt that the brothers purchased the property in 1940. Elizabeth testified that Robert and she departed Park City in 1940 and never again resided in that location. Although Elizabeth stated Robert had not been in Utah during 1947 and 1953, she did testify that her late husband did make some visits.

Maud Kimball testified that taxes on the property for the years 1942 through 1947 were delinquent, but were redeemed by Gilbert Kimball who then made payment on the taxes until his death in 1983. She stated that neither Robert nor his estate made any contribution for property taxes. Maud further testified that she was present in 1940 or 1941 when Gilbert and Robert had a discussion relative to the property at issue. When Gilbert asked Robert "if he wanted to pay half of the tax," Robert is reported as saying, "Hell no, I want to get out of Park City. I want to move away, and I want nothing further to do with this." Maud also stated that the brothers discussed the property in 1947. Maud testified, "My husband Gilbert asked if [Robert] wanted to redeem himself and be put back for half of the taxes, and he said, no, I'm living in California now, and I still want nothing to do with it." When questioned about answers given in her deposition taken prior to trial, Maud attempted to clear up what appeared to be discrepancies concerning whether she heard the conversations between Gilbert and Robert. She also stated that Robert told the Kimballs to remove his name from the deed, but because he was on vacation, Robert would not go to the county seat and clarify the matter with a quit-claim deed.

Gary Kimball, a son of Gilbert and Maud Kimball, testified that, in about 1953, he was present when his father and his Uncle Robert discussed property in Park City. A portion of the conversation concerned the property at issue. When his father told Robert what he had done relative to redeeming the property, Gary stated, "[Robert] said it was fine with him. He was out of Park City. He was gone for good and had no more interests here."

Gilbert Kimball's deposition was taken a few months prior to his death. In it he stated, "Long before my brother died he said he had nothing to do with this property. He refused to pay any part of the taxes on it, so we let the property go to taxes. And we bought it back in my name [in 1947]."

Attached to the notice of probate distribution recorded by the Fletchers' counsel was the decree of distribution concerning Robert's estate. Although the residuary clause refers to "any and all other property which may belong to said Estate, whether herein particularly mentioned or not," the section dealing with real property only refers to Robert's home in Salt Lake City.

The court found no evidence that the Kimballs ever gave notice to Robert of their intent to adversely possess the property. The court further found that Robert had never officially conveyed his interest to the Kimballs. However, the court made no findings concerning the extensive evidence showing Robert's intent that the Kimballs have the property. No evidence was presented in rebuttal.

The Kimballs assert that the claims of both the Fletchers and Sweeney are barred by the doctrines of laches and estoppel.

a. Laches

This doctrine was recently discussed in Borland By Dept. of Social Serv. v. Chandler, 733 P.2d 144, 147 (Utah 1987), where the court stated, "To successfully assert a laches defense, a defendant must establish both that the plaintiff unreasonably delayed in bringing an action and that the defendant was prejudiced by that delay." In Papanikolas Bros. Enter. v. Sugarhouse Shopping Center Assoc., 535 P.2d 1256 (Utah 1975), the court wrote:

> Although lapse of time is an essential part of laches, the length of time must depend on the circumstances of each case, for the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered by defendant and the length of plaintiff's delay.

Id. at 1260 (footnote omitted).

If we assume Gilbert's redemption of the property in his name in 1947 and notification of such redemption to Robert no later than the mid-1950's as giving rise to a cause of action by Robert or his successors in interest, approximately 25 years passed before any complaint was filed. During this period, the Kimballs paid all the property taxes and conducted themselves as if they had sole ownership. If Robert believed he still possessed a cotenant interest, his failure to claim the interest from the Kimballs or to commence an action prior to his death must be considered unreasonable and prejudicial to the Kimballs. This claim is barred by laches.

b. Estoppel

Leaver v. Grose, 610 P.2d 1262, 1264 (Utah 1980), reports, "The doctrine of estoppel has application when one, by his acts, representations, or conduct, or by his silence when he ought to speak, induces another to believe certain facts exist and such other relies thereon to his detriment (footnote omitted)." Additionally, "The elements of equitable estoppel are: 'conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.'" Blackhurst v. Transamerica Ins. Co., 699 P.2d 688, 691 (Utah 1985)(quoting United American Life Ins. Co. v. Zions First Nat'l Bank, 641 P.2d 158, 161 (Utah 1985)).

The Kimballs have relied on Robert's renouncement of interest in the property and on his continued silence and inaction to the time of his death. Robert's successors in interest now repudiate his actions and claim that he continued to maintain his status as a cotenant. There is little doubt that such repudiation is detrimental to the Kimballs. Because Gilbert and Maud believed Robert no longer desired an interest in the property, they did not pursue the matter further. If they had been given an indication of a change in Robert's position prior to his death, they could have attempted to obtain a conveyance from Robert, obtained an affidavit, or possibly brought a quiet title action. Robert's death rendered any further negotiations or contact with him impossible. Due to their reliance, the Kimballs found themselves in court defending title to the property. Even had we not found laches to bar this claim, it would be barred by estoppel. The Fletchers cannot claim any interest in the property because of the quit-claim deed from Robert's widow, Elizabeth.

ADVERSE POSSESSION

The court found that the Fletchers' use of a portion of the property was adverse to the Kimballs. Specifically, the trial court found the Fletchers' use "was not under any agreement or permission from any person or entity." We disagree. To hold a finding of fact to be clearly erroneous requires "that if the findings . . . are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings . . . will be set aside." State v. Wright, 744 P.2d 315, 317 (Utah App. 1987)(quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

In Olwell v. Clark, 658 P.2d 585 (Utah 1982), the court wrote:

> [I]n order to show successful adverse possession, the claimant must intend to acquire title, must by declaration or conduct give actual or constructive notice to the legal title holder, and must possess the property in a manner variously called "open," "notorious," or "hostile" for a period of seven years. . . . It is

> generally agreed that, in order for the claimant's conduct to give notice, it must be conduct that is inconsistent with the rights of the owner.

Id. at 587 (citation omitted).

Adverse possession cannot arise from use by the claimant with the permission of the legal title holder. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937). The record contains overwhelming evidence which indicates the Fletchers had permission to use portions of the property. Gilbert, in his deposition, states that Melvin Fletcher's father, Roy, had asked him for permission "to use the ground." The permission was granted as long as the Kimballs "had no use for it." Gilbert further claimed that Roy believed he owed Gilbert rent which the latter refused to accept. The deposition asserts that Gilbert offered to sell Melvin the property, but the two never agreed on a price. Gilbert's deposition refers to an exhibit which is a statement written by Juanita Fletcher Love, Roy's daughter and Melvin's sister. The statement reflects Juanita's understanding that a portion of the property in dispute belonged to Gilbert and was used with his permission. Additional mention is made of another exhibit which was also received by the trial court, a statement by Marion Fletcher, Roy's son and Melvin's brother. This statement indicates that Roy's use of the Kimball property was subject to Gilbert's revocable permission. Maud testified that the Fletcher family always had permission to use a portion of the Kimball property. Gary Kimball testified he was present when his father, Gilbert, discussed the property with Melvin and the latter made an offer of approximately $90,000 - $96,000 for it. Also, Melvin Fletcher testified, when asked if his family had the permission of the Kimball family to go across the property, "In a sense, yes, if they [the Kimballs] owned the ground." Melvin's testimony reveals he offered Gilbert $60,000 for the property, but had been refused. This evidence shows that Melvin's use of the Kimball property was with consent. We, therefore, hold that the finding of adverse possession, or conduct inconsistent with the rights of the Kimballs, is against the clear weight of the evidence.

The Fletchers have acquired no interest in the Kimball property at issue either through the quit-claim deed from Elizabeth or under the doctrine of adverse possession. The case is remanded to the trial court for entry of judgment consistent with this opinion.[2] Any Sweeney claims that are based on deeds received from the Fletchers and concern the Kimball property, must fail. Title to that property is quieted in the Kimballs. There appears to be no reason why the deeds between Sweeney and the Fletchers, not affecting the Kimball property, should not stand, although the trial court should examine this on remand. Each party will bear their own costs on appeal.

This opinion is not regarded as adding anything significant to existing law. Additionally, the fact situation is so complex that the case might prove confusing to any reader. For these reasons this opinion is not to be published in the Utah or Pacific Reporters.

Richard C. Davidson, Judge

I CONCUR:

Judith M. Billings

Judith M. Billings, Judge

ORME, Judge: (concurring specially)

I agree that this difficult case should be remanded, although I am not prepared to go as far as my colleagues in defining what the outcome on remand should be.

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[2] We find it difficult to follow from the record why the trial court signed the judgment and decree of quiet title which does not comport with its oral ruling. We realize the trial court heard objections to the findings of fact, conclusions of law, and the judgment and decree, but there is nothing before us to indicate why the changes from the oral ruling were made.

As concerns the issue of Robert Kimball's widow's curious conveyance to Melvin Fletcher, I also see error in the trial court's not making findings "concerning the extensive evidence showing Robert's intent that the Kimballs have the property." While the majority's analysis of the two doctrines is sound, I am not, however, persuaded that the evidence shows as a matter of law that the Fletchers' claim is barred by laches and/or estoppel. As to this part of the dispute, I would simply remand with instructions that the trial court make findings relative to Robert's comments and conduct and draw any appropriate legal conclusions concerning laches and estoppel from those findings.

I concur in Judge Davidson's opinion insofar as it concerns the adverse possession issue and the treatment to be accorded on remand to the deeds between Sweeney and the Fletchers.

I share Judge Davidson's puzzlement as reflected in footnote 2 of the main opinion. While it is true that "[a]ny judge is free to change his or her mind on the outcome of a case until a decision is formally rendered," Bennion v. Hansen, 699 P.2d 757, 760 (Utah 1985), the court's ruling from the bench, fresh on the heels of trial, is a product of the court's own mental impressions and contemporaneous, neutral assessment of the evidence. Subsequently presented findings of fact and conclusions of law, insofar as different from such a ruling, are more a product of counsel's view of the case--and sometimes of his or her imagination. While a court has every right to alter its perception of a case, it should take pains to explain fully any differences between its "untainted" ruling from the bench and its formal decree.

Finally, I would order counsel not to disclose this case to the Bar Examiner Committee of the Utah State Bar. They would be unable to resist fashioning the next Bar exam's real property question after the facts of this case--and such would clearly violate the Bar applicants' rights under the eighth amendment to the United States Constitution.

Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of October, 1988, a true and correct copy of the foregoing Opinion was mailed to each of the following:

Robert M. Felton
Attorney for Appellants, Kimball
310 South Main Street, Suite 1309
Salt Lake City, UT 84101

Paul D. Veasy
Attorney for Respondent, Sweeney Land Company
50 West Broadway, 4th Floor
Salt Lake City, UT 84101

Gerald H. Kinghorn
Attorneys for Respondents, Fletcher
9 Exchange Place, Suite 1000
Salt Lake City, UT 84111

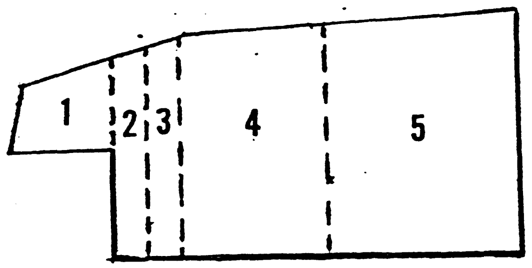
Hon. J. Dennis Frederick
Third District Court
Summit County
Case No. #6211

Julia C. Whitfield
Case Management Clerk

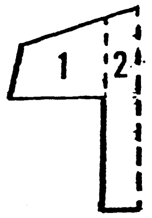
Claimed

Awarded

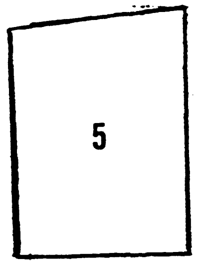
Kimball



100% pursuant to tax deed as corrected by 1976 correction deed, joint tenancy to Maud Kimball.

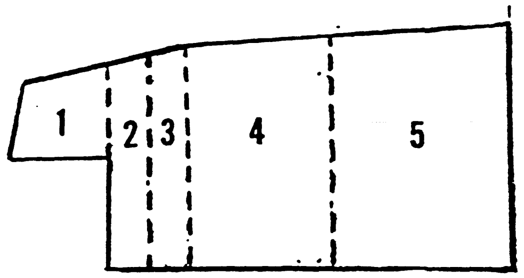


50% co-tenant interest.

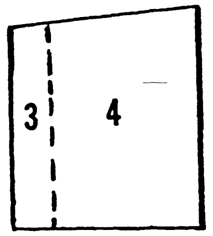


100% pursuant to partition by court.

Fletcher

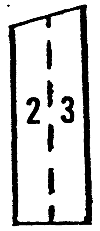


50% co-tenancy pursuant to tax deed, as corrected by 1976 correction deed; heirship to Elizabeth Kimball Quitclaimed to Fletchers.

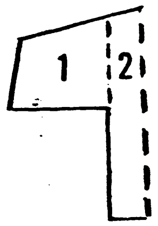


100% pursuant to partition by court.

Sweeney



100% pursuant to United Park City Mines Co. Quitclaim Deed.



50% co-tenant interest pursuant to Quitclaim Deed from Fletchers.

LEGEND:
PARCEL 1 — the "Herschiser Parcel".
PARCEL 2 — the north half of the 30 foot strip.
PARCEL 3 — the south half of the 30 foot strip.
PARCEL 4 — the north half of the warehouse parcel.
PARCEL 5 — the south half of the warehouse parcel.

Sources of Title to the Subject Parcels as Found by the Court

PARCEL NUMBER:	Maud Kimball	G. Kimball Estate	Mr. & Mrs. Fletcher	Sweeney Land Co.
1.	50% co-tenant interest. (Tax deed as corrected by 1976 correction deed and operation of law at death of joint tenant G. Kimball. No adverse possession.)	None. (Joint tenancy interest terminated at death.)	None. (All interest conveyed to Sweeney Land Co..)	50% co-tenant interest conveyance from Fletcher.
2.	Same as parcel 1.	Same as parcel 1.	Same as parcel 1.	Same as parcel 1. (No adverse possession.)
3.	None. (Partition by Court. No adverse possession.)	Same as parcel 1.	100% vested in Fletcher's by partition of Court. Tax deed as corrected by 1976 correction deed, succession from Robert Kimball and Quitclaim Deed from Elizabeth Kimball.	None. Purported root of title deed fails to describe parcel. No adverse possession.
4.	Same as parcel 3.	Same as parcel 1.	Same as parcel 3.	No claim.
5.	100% vested in Maud Kimball by 1940 tax deed as corrected by 1976 correction deed and operation of law at death of joint tenant G. Kimball.	Same as parcel 1.	None. Partition by Court.	No claim.

Note: No party appeared to represent interest of Herschiser's to parcels 1,2, and 3. Default entered after service by publication.

EXHIBIT 2

GERALD H. KINGHORN
KAPALOSKI, KINGHORN & PETERS
Attorney for Melvin and Peggy Fletcher
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111
Telephone: (801) 364-8644

IN THE THIRD DISTRICT COURT FOR

SUMMIT COUNTY, STATE OF UTAH

NO. ....
FILED
NOV 5 1985
Clerk of Summit County
BY .... Deputy Clerk

SWEENEY LAND COMPANY,

Plaintiff,

vs.

GILBERT and MAUD KIMBALL
et al.,

Defendants.

GILBERT and MAUD KIMBALL,

Crossclaim Plaintiffs,

vs.

MELVIN FLETCHER and PEGGY
FLETCHER, et al.,

Counter-Crossclaimants.

FINDINGS OF FACT
AND CONCLUSIONS
OF LAW

Civil No. 6211

On the 5th day of September, 1985, at 9:00 a.m. the issues raised in the pleadings between the parties came on regularly for non-jury trial before the Honorable J. Dennis Frederick, Judge, at the Summit County Courthouse, Coalville, Utah.

The Plaintiff was present and represented by counsel, Edward S. Sweeney and Paul D. Veasy of Behle, Haslam and Hatch, the defendant, counterclaimant and crossclaimant Maud Kimball was present in person and by counsel, Robert M. Felton. Defendants, counterclaimants and crossclaimants, Melvin and Peggy Fletcher

EXHIBIT 3

were present in person and were represented by Gerald H. Kinghorn of Kapaloski, Kinghorn & Peters.

Mr. Felton moved the Court for an order excluding witnesses from the Courtroom until called to testify. The motion was granted and the Court asked that each witness proposed by the parties, except the parties themselves, be sworn. The Court then admonished the witnesses to not discuss their testimony or the testimony of others except with counsel. The proposed witnesses were then excluded from the Courtroom.

Counsel for each party made a short opening statement. After the conclusion of the opening statements of counsel, Mr. Felton moved the Court for an order granting a judgment of quiet title to Maud Kimball for a portion of the property at issue generally described as the "Hershiser" parcel. After hearing the arguments of counsel, the Court denied the motion with leave to reconsider after hearing the evidence.

The parties presented a written stipulation to the Court signed by counsel for each party to permit the admission as evidence of the exhibits named in the stipulation, reserving the claims of the parties as to the relevance and/or materiality of the exhibits. The stipulation is the result of pretrial conferences between counsel for the parties where the stipulated exhibits were disclosed, reviewed, investigated and corrected where appropriate, to enable the parties to stipulate to the admission of the exhibits without the necessity of individual witness or document foundation for each exhibit. It is the understanding of the parties on the record that the plaintiffs, exhibits 1, 2, 3 and 5 are admitted. ~~for illustrative purposes only.~~ The Court approved the stipulation of the parties and received the exhibits in evidence.

The Plaintiff called and examined the following witnesses: Randy Sorensen, Robert B. Jones, Melvin H. Fletcher and Edward S. Sweeney.

The Defendant Kimball then called and examined the following witnesses: Maud Kimball, Gary Kimball, Robert Ruggeri, Melvin Fletcher; the deposition of Gilbert Kimball was considered as evidence of the testimony of Gilbert Kimball. The depositions of Maud Kimball and Melvin Fletcher were published.

The Defendants Fletcher then called and examined the following witnesses: Les Roach and Elizabeth W. Kimball.

Following the testimony of the witnesses on behalf of the Defendants Fletcher, Defendant Kimball recalled Maud Kimball as a rebuttal witness.

Each party rested and a closing statement was made by counsel for each of the parties. At the conclusion of the closing statements of counsel, the Court recessed the trial at 5:30 p.m. on September 5th to be reconvened at 9:00 a.m. on September 6, 1985 for further proceedings. On September 6 at 9:00 a.m. trial was reconvened and the Court announced its decision in general terms and directed counsel for the Defendants Fletcher to prepare Findings of Fact, Conclusions of Law and a Decree of Quiet Title based on the evidence.

Based upon the testimony in open Court, the documents, surveys and affidavits entered into evidence, the candor and lack of candor, demeanor of the witnesses and parties and the equities in favor of or against each party apparent from the facts and circumstances established by the evidence, the Court makes the following:

FINDINGS OF FACT

1. The real property which is the subject of the claims of the parties is located in Block 53 of Snyders Addition to Park City as recorded in the office of the County Recorder of Summit County, Utah.

2. Block 53 of Snyders Addition to Park City as shown by the records of the Summit County Recorder was platted as a block of land without platting or dedication of interior streets or further subdivision into lots.

3. The Plaintiff and the Defendants Fletcher signed and filed a stipulation dated May 31, 1984. Sweeney Land Company and Melvin Fletcher and Peggy Fletcher have performed the execution and delivery of the deeds described in the stipulation.

4. Based on the pleadings herein, the parties claim unencumbered fee simple title to certain parcels of land generally described as follows:

Sweeney Land Co. claims title to a parcel of land approximately 30 feet in width extending from the east street line of Park Avenue in Park City as the westerly boundary, thence in a northeasterly direction thirty feet wide for approximately 164

385

feet (the 30 foot strip). Sweeney Land Company has quitclaimed 15 feet of the 30 foot strip south of the center line of the 30 foot strip to the Defendants Fletcher for a distance extending from East line of Park Avenue northeasterly for approximately 99 feet. The Fletchers have quitclaimed the north 15 feet of the 30 foot strip to Sweeney Land Co. and all the Fletchers interest in the "Hershiser" parcel. Sweeney Land Co. did not amend its pleadings thereafter.

Maud Kimball claims a large parcel of land including the warehouse area, the 30 foot strip and the Hershiser parcel as described more specifically in the Defendant Kimball counterclaim and crossclaim. The Kimball claim overlaps the east 65 feet of the Sweeney 30 ft. strip claim. The Hershiser parcel is the northern-most portion of the land claimed but does not conflict with the Plaintiff claim. (The "Hershiser-Kimball Parcel").

The Fletchers claim a 50% undivided interest as co-tenants with Maud Kimball to the "Hershiser-Kimball" parcel, the South 15 feet of the 30 foot strip deeded to them by Sweeney Land Company and as an alternative claim, a prescriptive easement for continued use as garage, storage space, parking and ingress and egress over, across and through the Hershiser-Kimball parcel adjacent to the east of the Fletchers home parcel. The ownership of the home area deeded to the Fletchers by Mary Workman is not at issue.

The present Fletcher claims are defined in the amended counter-claim and cross-claim filed by Fletchers after they received a deed from Elizabeth W. Kimball in 1983, which described the same land as claimed by Maud Kimball.

5. For at least one hundred years prior to the filing of the complaint herein, properties were generally conveyed in the area of the subject properties without accurate surveyed or dimension specific legal descriptions and under general statements as to the location and dimensions of the subject properties. Under the circumstances, it is reasonable that the Court interpret the legal descriptions contained in the various instruments upon which the parties claims are based in a manner consistent with the physical location of buildings and objects in relation to each other, roads, improvements, dimensions described in the instruments and the actual possession of the properties by the parties and their predecessors in interest.

7. The 30 foot strip claimed by the Plaintiff Sweeney was conveyed to the Sweeney's predecessor, the United Park City Mines Co., in 1953 by the Silver King Coalition Mines Company and Park Utah Consolidated Mines Company by a deed which described the property as a 30 foot strip of land which began at the easterly side of Park Avenue and extended in a northerly direction for an indefinite distance to a point generally stated as a right-of-way granted under a specific deed dated November 13, 1883. The November 13, 1883 deed described in the conveyance to United Park City Mines Co. is not of record and there is no evidence of the terms or specific location of the right of way described in the missing deed. In 1953 when the deed to United Park Mines was

executed and delivered, the scalehouse and warehouse described in the legal description of the 30 foot strip were not in existence and therefore the northeasterly boundary of the 30 foot strip could not be identified.

8. In 1940 Robert T. Kimball and Gilbert Kimball purchased from Summit County certain interests in land in the area of the Hershiser-Kimball parcel. The area had been purchased in 1928 by Robert W. Kimball, the father of Robert T. Kimball and Gilbert Kimball. Robert W. Kimball conveyed the property to Robert T. Kimball. Robert and Gilbert thereafter deeded the property in a mortgage-deed transaction as security for a loan. Taxes on the property were not paid and the property ultimately was purchased by Summit County for taxes. In 1940 Robert T. Kimball and Gilbert Kimball purchased the Hershiser-Kimball parcel from Summit County under a general legal description which did not completely and accurately describe the dimensions of the area Summit County intended to convey and the Kimballs intended to purchase.

Robert T. Kimball and Gilbert Kimball were brothers and business partners in the Kimball service station and garage. In 1976, the Defendant Kimball commissioned a survey by Robert Jones of the property owned pursuant to the deed from Summit County executed and delivered in 1940 to Gilbert Kimball and Robert T. Kimball. The 1976 Jones survey accurately depicts the property intended to be conveyed to the Kimball brothers in 1940 by Summit County.

9. The plaintiff received a quitclaim deed from United Park City Mines in 1980 containing a land description which partially overlaps the property claimed by the Defendants Fletcher and Kimball; the Plaintiffs were on notice by virtue of the recordation of the deed by the Defendant Kimball of the cverlap and the actual occupation and historic use of the area by Fletcher that title to the 30 foot strip was disputed. The Plaintiff and its predecessors in interest used and occupied no more than the north 15 feet of the 30 foot strip, for a distance of 99 feet extending from the easterly right of way line of Park Avenue.

10. Portions of the property claimed by Sweeney Land Co. and Kimball have been used and occupied by the Defendants Fletcher for a period in excess of 20 years openly and notoriously. The use of the Hershiser-Kimball property by the Defendants Fletcher and the Fletchers predecessor in interest was not under any agreement or permission from any person or entity. There is no credible evidence that the Fletchers use was not adverse to Kimballs and all others and therefore the use by Fletchers was and is adverse to the Kimballs. The area used and occupied openly, notoriously, adversely, and exclusively by the Defendants Fletcher is generally described as that area lying North of a line beginning at the Southeast corner of the land conveyed to Melvin H. Fletcher by his predecessor in interest and proceeding therefrom at a bearing of North 61° 10' East across the Kimball property to the gravel road depicted on the exhibits a distance

of approximately 71 ft. with the exception of a small stucco building located on the property which has been used by the Defendant Kimball since approximately 1940. No portion of the property described by the Kimball counterclaim has been occupied by the Kimballs with the exception of the stucco building indicated on the Exhibits within the last forty years.

The Defendants Fletcher occupied the area of the 30 foot strip claimed by the Defendants Kimball for a period in excess of 20 years and used the area for commercially valuable purposes including ingress and egress to their property, for parking of vehicles, for garage purposes and for the storage of household materials, garden utensils, hunting equipment and other miscellaneous, personal property.

11. The Plaintiff and its predecessors in interest paid property taxes for an area which was indefinite and therefore the Plaintiffs have failed to sustain their burden of proof that the Plaintiff paid property taxes on the entire 30 foot strip as claimed in the complaint. The payment of property taxes by the Plaintiff was consistent with the claims of the other parties and the legal description in the deed to United Park City Mines in 1953.

12. The Kimballs paid property taxes from 1977 to the present on the entire parcel described in the survey of property by Robert B. Jones.

13. Based on the testimony of Maud Kimball and the relevant deed language Gilbert J. Kimball and Maud Kimball intended

to create a joint tenancy interest between themselves by the execution and recordation of the deeds. Gilbert Kimball died prior to the trial of the matter and his joint tenant Maud Kimball survived him.

14. There is no evidence that Gilbert J. Kimball, Maud Kimball or any party on their behalf ever provided notice of any kind to Robert W. Kimball or his successors to the effect that Gilbert Kimball and Maud Kimball intended to adversely possess the Kimball parcel as against Robert W. Kimball; there is no instrument or other evidence of the conveyance of the co-tenant interest of Robert W. Kimball to Gilbert Kimball or Maud Kimball or conveyance of the interest of Robert W. Kimball to any party other than by operation of law to Robert's heir, Elizabeth Wilkins Kimball. In 1976, (the date of death of Robert W. Kimball) Robert Kimball had not received notice of any act of adverse possession or executed any instrument to convey the Kimball parcel; Robert Kimball possessed an undivided 50% interest in the Hershiser-Kimball parcel as more correctly described in the Robert B. Jones survey which is of record.

15. Since 1942 Gilbert Kimball and Maud Kimball have paid the property taxes on the Hershiser-Kimball parcel including the taxes due November 30, 1983 in the total amount of $4,641.66. The record shows that on or about February 15, 1984, the Fletchers tendered the sum of $2,320.83 to the Defendant Kimball by check to the Clerk of the Court where the funds tendered are on deposit. The Defendants Fletcher are indebted to the

Defendant Kimball for one half of the amount of all property taxes paid by the Defendant Kimball which is the sum of $2,320.83 not including taxes for the years 1984 and 1985. The Defendants Fletcher owe an amount equal to one half of the property taxes for 1984 and 1985 to Maud Kimball.

Based upon the foregoing findings of fact the Court makes the following:

CONCLUSIONS OF LAW

1. The claim of each party must be sustainable on its own merits. Each claim should be evaluated based on a root of title or title by adverse possession where appropriate. The terms of the stipulation are reasonable and the stipulation should be approved and recognized by the Court and where otherwise appropriate made a part of the Decree of Quiet Title herein.

2. The Plaintiff is entitled to a decree of quiet title as its sole property to a strip of land north of the centerline of the 30 foot strip for a distance of 99.03 feet from the east right-of-way line of Park Avenue as platted in the plat of Snyders Addition to Park City. The Plaintiff may be entitled to a decree quieting title in the Plaintiff to a 50% undivided interest with Maud Kimball in the Hershiser parcel deeded to the Plaintiff by Defendants Fletcher together with a 50% undivided interest in the 15 feet North of the centerline of the 30 foot strip deeded to the Plaintiff by the Defendants Fletcher. Because the pleadings of the Plaintiffs do not state a claim for quiet title as a co-tenant with Maud Kimball or for partition of

the co-tenant interests the decree herein should not define an interest other than the interest of record in the office of the Summit County Recorder.

3. The Defendants Melvin Fletcher and Peggy Fletcher are the successors-in-interest to the co-tenant interest of Robert W. Kimball as conveyed to them by his heir Elizabeth W. Kimball. It is reasonable that the interests of the co-tenants be partitioned in a manner consistent with the reasonable use of the property by each co-tenant and in a manner which will preserve the economic value for each party in a roughly equal manner. The decree of quiet title should partition the Hershiser-Kimball parcel to quiet title in Melvin Fletcher and Peggy Fletcher to the portion of the Hershiser-Kimball parcel described as follows:

> Beginning at a point North 23°38' West 85.97 feet and North 33°26' West 46.70 feet from the Southeast corner of Block 7, Amended plat of Park City in Section 16 Township 2 South, Range 4 East, Salt Lake Base and Meridian, and South 61°10' West, 73.16 feet and North 28° 50" West 55.7 feet to the true point of beginning;
>
> Thence along the following courses and distances: North 28°50' West along the East boundary of the land conveyed to Melvin Fletcher by Mary Workman a distance of 60.6 feet, thence North 61°10' East 61.93 feet, thence South 43° 13' East 15 feet, thence South 33°25' East 47.6 feet more or less, thence South 61°10' West 70 feet more or less to the true point of beginning.

4. The area of the Hershiser-Kimball parcel which is South of the Fletcher partition parcel described above should be partitioned to Maud Kimball as her sole and separate property.

Gilbert Kimball and Maud Kimball were joint tenants in the 50% undivided interest purchased by Gilbert in 1940 and therefore upon Gilbert's death any interest of Gilbert terminated and Maud became the sole owner of the 50% undivided interest in the Hershiser-Kimball parcel. A decree of quiet title should issue to Maud Kimball as follows:

> Beginning at a point North 23° 38' West 85.97 feet and North 33° 26' West 46.7 feet from the Southeast corner of Block 7, amended plat of Park City, Utah in Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian, thence South 61° 10' West 73.16 feet, thence North 28° 50' West 55.7 feet, thence North 61° 10' East, 70 feet more or less, thence South 33° 25' East, 58 feet more or less to the point of beginning.

Maud Kimball should also be decreed a 50% undivided interest as a co-tenant with Sweeney Land Company as the owner of a 50% undivided interest in the Hershiser parcel as described in the exhibits and to the balance of the land north of the extended center line of the 30 foot strip immediately adjacent to the parcel of land quieted to Melvin Fletcher and Peggy Fletcher above.

5. It is reasonable that each party bear its own attorneys fees and costs and therefore no award of attorneys fees or costs should be made to any party against the other.

DATED this 4th day of ~~October~~, 1985.

BY THE COURT

J. Dennis Frederick
District Judge

conveyed to Melvin Fletcher by Mary Workman a distance of 60.6 feet, thence North 61°10' East 61.93 feet, thence South 43° 13' East 15 feet, thence South 33°25' East 47.6 feet more or less, thence South 61°10' West 70 feet more or less to the true point of beginning.

Each party is to bear their own costs and attorneys fees.

DATED this 4th day of ~~October,~~ Nov. 1985.

BY THE COURT:

J. Dennis Frederick
District Judge

SUMMIT COUNTY, A
municipal corporation
of the State of Utah

-to-

GILBERT J. KIMBALL and
ROBERT W. KIMBALL,

QUIT CLAIM DEED

Entry No. 66568
Recorded March 22, 1940
Book G, Page 224
Dated March 22, 1940
Cons: $48.00 and $2.00 for
the deed

CONVEY & QUIT CLAIMS:

All its right, title and interest acquired under tax sale for the years 1932-3-5-7-8, the following described property in Summit County, Utah, to-wit:

98 feet by 77 feet on Block 53 of Snyder's Addition to Park City, Utah.

The above property was sold for delinquent taxes for the years 1932,3,5,7 and 1938 inclusive in the name of Sydney Mulcock and an auditors deed taken by Summit County.

This deed is made under authority of Section 80-10-68 Revised States of Utah, 1933 and pursuant to an order of the Board of County Commissioners, duly passed on the 4th day of March, 1930.

Witness:
Chas L. Frost
(SEAL)

Signed: SUMMIT COUNTY, a municipal corporation of the State of Utah y
By: John E. Wright Clerk

Ack'd March 22, 1940, regularly before Mae R. Tree, County Recorder,
(Seal)

(SHOWN FOR INFORMATION)

EXHIBIT 4

Recorded at Request of ______

at ______ M. Fee Paid $ ______

by ______ Dep. Book ______ Page ______ Ref.: ______

Mail tax notice to ______ Address ______

QUIT-CLAIM DEED

GILBERT J. KIMBALL AND MAUD KIMBALL, HIS WIFE, grantors of Park City, , County of Summit, , State of Utah, hereby QUIT-CLAIM to

GILBERT J. KIMBALL AND MAUD KIMBALL, HIS WIFE, AS JOINT TENANTS WITH FULL RIGHTS OF SURVIVORSHIP,

grantees of Park City, County of Summit, State of Utah for the sum of TEN - DOLLARS, and other good and valuable consideration, the following described tract of land in Summit County, State of Utah:

Beginning at a point North 23° 38' West 85.97 feet from the Southeast corner of Block 7, Amended Plat of Park City in Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian and running thence South 61° 10' West 73.16 feet; thence North 28° 50' West 128.59 feet; thence North 61° 10' East 33.90 feet; thence North 28° 50' West 30.00 feet; thence North 54° 11' East 17.00 feet; thence South 43° 13' East 56.50 feet; thence South 33° 25' East 103.30 feet to the point of beginning and being the same property described in that certain Quit-Claim Deed from Summit County, grantor, to Gilbert J. Kimball and Robert W. Kimball, grantors, recorded in the records of the Summit County Recorder on March 22, 1940 in Book G of Quit-Claim Deeds, p.224, as Entry No. 66568 and described therein as 98 feet by 77 feet on Block 53, Snyders Addition and bearing Serial No. SA-348.

Entry No. 135039 Book M37
RECORDED 12-3-76 at 12:40 PM Page 497
REQUEST of Gilbert J. Kimball
FEE [illegible]
$ 2.20 Wanda Y. Spriggs
INDEXED ABSTRACT

Witness the hand of said grantors , this third day of December, , A. D. one thousand nine hundred and seventy-six

Signed in the presence of

Gilbert J Kimball
Gilbert J Kimball

Maud Kimball, his wife
M Kimball

STATE OF UTAH,
County of Summit } ss.

On the third day of December A. D. one thousand nine hundred and seventy-six personally appeared before me

GILBERT J. KIMBALL AND MAUD KIMBALL, his wife,

the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

Notary Public.

[illegible] Address:

BOOK M37 PAGE 497

EXHIBIT 5

GILBERT J. KIMBALL and
MAUD KIMBALL, his wife,

-to-

GILBERT J. KIMBALL AND
MAUD KIMBALL, his wife,
as joint tenants with full
rights of survivorship,

CORRECTED QUIT CLAIM DEED

Entry No. 140155
Recorded Sept. 7, 1977
Book M-99, Page 504
Dated Sept.__, 1977
Cons:$10.00 and other good
and valuable consideration.

QUIT CLAIM:

Beginning at a point North 23 degrees 38' West 85.97 feet and North 33 degrees 25' West 46.70 feet from the Southeast corner of Block 7, Amended Plat of Park City in Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 61 degrees 10' West 73.16 feet; thence North 28 degrees 50' West 128.59 feet; thence North 61 degrees 10' East 33.90 feet; thence North 28 degrees 50' West 30.00 feet; thence North 64 degrees 11' East 17.00 feet; thence South 43 degrees 13' East 56.50 feet; thence South 33 degrees 25' East 103.30 feet to the point of beginning and being the same property described in that certain Quit Claim Deed from Summit County, grantor, to Gilbert J. Kimball and Robert W. Kimball, grantors, recorded in the records ofthe Summit County Recorder on March 22, 1940, in Book G of Quit Claim Deeds, P. 224, as Entry No. 66568 and described therein as 98 feet by 77 feet on Block 53, Snyders Addition and bearing Serial No. SA 348.

This Deed is executed and delivered to correct an error in the description of the real property described in that certain Quit Claim Deed executed by the above named grantors on December 3 1976, in favor of the above named grantees and recorded in the records of the Summit County Recorder on December 3, 1976, in Book M-87, Page 497, thereof, being Entry No. 135034.

Signed and Acknowledged regularly.

EXHIBIT 6

(continued)

A I don't remember.

Q Did he make out a deed to you for this property before he passed away?

A No. No.

Q Did he have a will?

A No. Long before my brother died he said he had nothing to do with this property. He refused to pay any part of the taxes on it, so we let the property go to taxes. And we bought it back in my name.

MRS. KIMBALL: And it was Judge Robert Mc Conough, who told us how to do it.

Q (By Mr. Kinghorn) Sometime ago, back after your father bought this property where the warehouse was--

A Yes.

Q --where the stucco shed is now; is that correct?

A Yes.

Q Did he sell it or did you and your brother sell it to a man named Sid Mulcock?

A We put it up for security when we built the garage.

Q Did you ever sign a warranty deed to Sid Mulcock on that property?

A What?

Q Did you ever deed that property to Sid Mulcock?

A Yes. We put it up for security to Sid Mulcock.

Q But you deeded it over to Sid Mulcock, didn't you?

EXHIBIT 7

To Whom It May Concern:

I, Marion G. Fletcher, of Salt Lake City, Utah, do hereby declare that I am the son of Roy Fletcher, formerly a resident of Park City, Utah. This document relates to property of Roy Fletcher known as the Park Avenue property.

During the lifetime of my father, I had discussions with him regarding this Park Avenue property and the use by him of the adjacent Kimball property. The legal description and a pictorial survey of the Kimball property is displayed on the page attached hereto. My father acknowledged the ownership of the Kimball property by Gilbert John Kimball and Maude S. Kimball, his wife, having stated that his use of the roadways and buildings and his use of the Kimball property was by permission of Gilbert J. Kimball under a revokable agreement my father had worked out with him. The above recitation has also always been my understanding of the matter.

It was my father's understanding that at any time Gilbert J. Kimball would request, the improvements placed on the Kimball property would be subject to removal by my father without compensation, and use of the Kimball property discontin

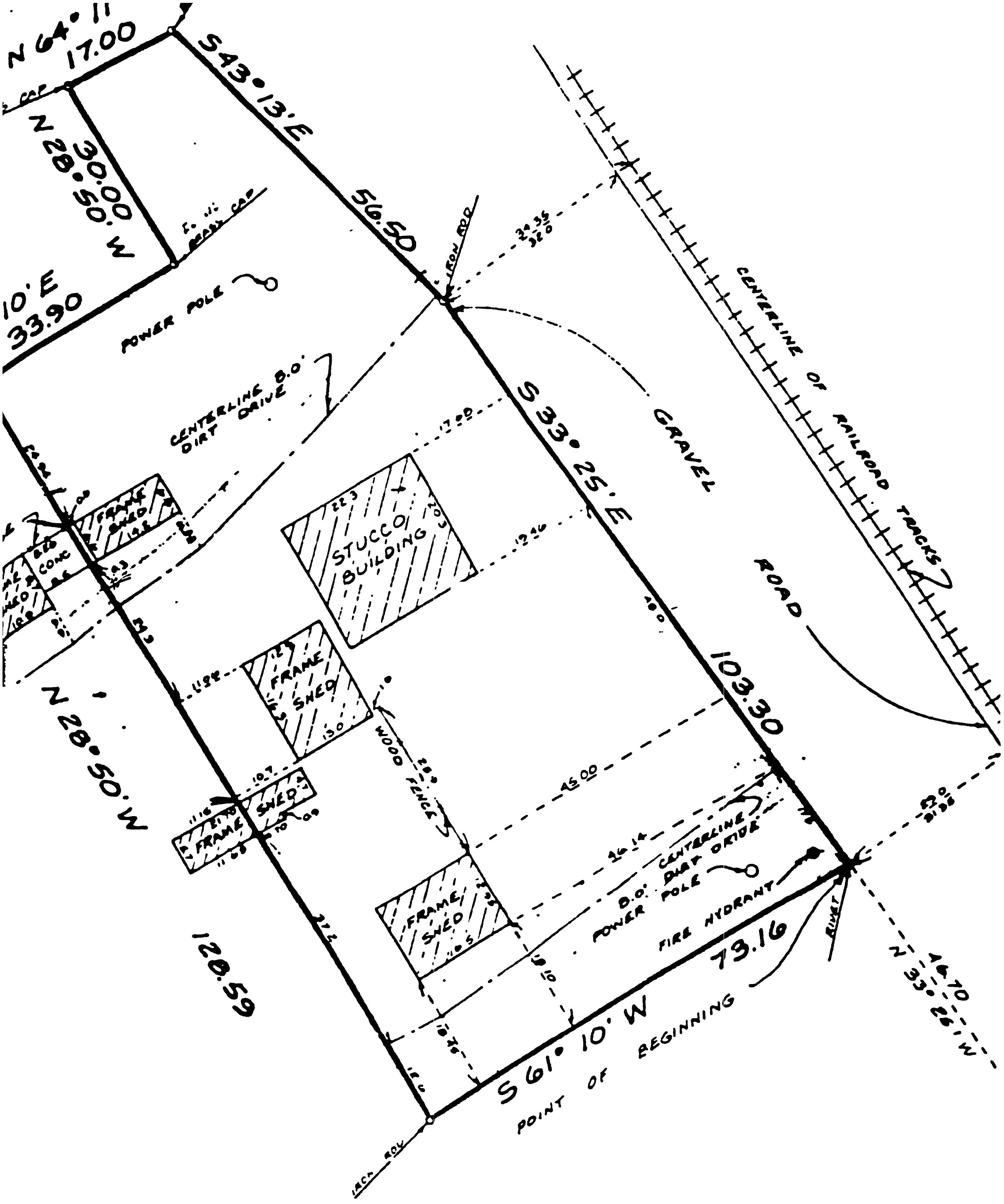
Dated this 26 day of July, 198

Marion G. Fletcher
MARION G. FLETCHER

Signed and delivered
in the presence of:

Gilbert J. Kimball

EXHIBIT 8



SURVEYOR'S CERTIFICATE

I, Robert B. Jones, Salt Lake City, Utah, do hereby certify that I am a registered Land Surveyor and that I hold License No. 1525, as prescribed by the laws of the State of Utah, and I have made a survey of the following described property:

Beginning at a point North 23° 38' West 85.97 feet ℄ N 33°25' W 46.70 feet from the Southeast corner of Block 7, Amended Plat of Park City in Section 16, Township 2 South, Range 4 East Salt Lake Base and Meridian and running thence South 61° 10' West 73.16 feet; thenc North 61° 10' East 33.90 feet; thence North

To whom it may concern,
As far as my knowledge in growing up, I we understood that our back entrance always belonged to Gib Kimball and his son Clifford, Roy Fletcher, permission to use it.

Juanita Fletcher

4537 - 537 N.E.
Seattle, Wa -
98155

206-363-6777

EXHIBIT
#7
1-28-83 lh

PENGAD-Bayonne, N.J.

EXHIBIT 9

about this property that is involved in the litigation?

A Now, shall I answer?

MR. FELTON: Yes.

THE WITNESS: No, I didn't.

MR. FELTON: Answer his question. Have you talked to Bob about it?

Q (BY MR. KINGHORN) Have you ever talked to Bob about it?

A I didn't but Gib did and repeated it to me.

Q When did Gib tell you he had talked to Bob about this property?

A Well, it would be 1947.

Q Okay.

A They were living in California and they came back to Utah on their vacation and they always dropped in to see us.

Q Did they drop in to see you in 1947?

A In Park City, yes, and I remember the date accurately because, as I told you before, I had been very ill in Holy Cross Hospital. I was recuperating and they came in to see me.

Q Did you hear a discussion at that time between Gib and Robert, and Bob?

A I did not hear it but Gib told me about it.

Q Okay.

A And Bob never refuted it. He came many times until

EXHIBIT 10

his death. Now, this is what Gilbert told me that Bob said.

Q In 1947?

A 1947.

Q Okay.

A He said, "Bob, I paid all the taxes on this property for the last seven years. Would you like to pay your half?" And Bob said, "I don't want anything further to do with Park City. I am through with it. You get my name off of there." And Gib said, "All right. Let's go to Coalville and have it done." And Bob said, "I am on my vacation. I am not going to fool around with attorneys and all of that mess." He said, "I am not going to give one day of it. Just take my name off as best you can."

Q Do you know if anything was done after that to get Bob's name off?

A When Gib--we had very little money. They had a salary.

Q Okay. Just tell me if anything was done after that to get Bob's name off the title.

A The taxes were not paid for five years. They took "The Park Record" in California. They saw that property was up for sale. They did not try to retrieve it. When it came up for sale, I didn't want it to go and I bought--I sent the check to Coalville and paid for it. Park City was a ghost town, it had no value then, and I think it was around $50.00, or something, I don't remember. And then they had, it was a quit claim deed they gave to me. I thought it should have gone to me. I paid for it. Bob's name should have been off of it and Gib's too. But they had three years to redeem it. They had eight years, five years. This was on a tax sale in "The Park Record" that they took and three years later after the quit claim deed came, they could have redeemed it. They had eight years to redeem that property if they had wanted it but they didn't want it evidently.

Q And so that is your recollection of how--

A It is the truth.

Q Okay. The record, by the way, doesn't show anything like that happening.

A I don't know why it shouldn't. I sent the check in.

Q Well, I am just telling you that in terms of what is written down.

A In 44 years they have not paid one cent of taxes.

Q I understand that.

A My taxes on that last year was $1,226.29.

Q I understand that. So it has been your understanding since that--

A It has been my knowledge.

MR. FELTON: Let him finish, Maud, please.

Q (BY MR. KINGHORN) It has been your opinion, based on what happened, that Robert Kimball's name has not been